

UNITED STATES DISTRICT COURT **Jan 25, 2019**  
EASTERN DISTRICT OF WASHINGTON

WALTER LAWRENCE G.,

No. 2:17-CV-00383-SMJ

Plaintiff,

**ORDER RULING ON CROSS-  
MOTIONS FOR SUMMARY  
JUDGMENT**

v.

COMMISSIONER OF SOCIAL  
SECURITY,

Defendant.

Before the Court, without oral argument, are the parties' cross-motions for summary judgment, ECF Nos. 12 & 13. Plaintiff appeals the Administrative Law Judge's ("ALJ") denial of his application for social security benefits. ECF No. 3. Plaintiff argues the ALJ erred in (1) assessing Plaintiff's claims about the severity of his symptoms and (2) weighing the opinion of Plaintiff's examining psychologist. The Commissioner of the Social Security Administration asks the Court to affirm the ALJ's decision. ECF No. 8.

After reviewing the record and relevant legal authorities, the Court is fully informed. For the reasons set forth below, the Court affirms the ALJ's decision and therefore denies Plaintiff's motion and grants the Commissioner's motion.

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## I. BACKGROUND<sup>1</sup>

2 On February 6, 2014, Plaintiff applied for Supplemental Security Income,  
3 alleging disability beginning December 1, 2007. AR<sup>2</sup> 18. The Administration  
4 denied the claims initially and upon reconsideration, and Plaintiff requested a  
5 hearing. AR 18. ALJ Marie Palachuk presided over a hearing in Spokane,  
6 Washington on December 1, 2016. AR 18. The ALJ issued a decision unfavorable  
7 to Plaintiff. AR 15–28. The Appeals Council denied Plaintiff’s request for review.  
8 AR 1.

## II. ALJ FINDINGS<sup>3</sup>

10 At step one, the ALJ found Plaintiff has not engaged in substantial gainful  
11 activity since February 6, 2014. AR 20. At step two, the ALJ found Plaintiff has the  
12 following severe impairments: non-ischemic cardiomyopathy (status post repair of  
13 the ascending aorta), morbid obesity (body mass index 46), chronic obstructive  
14 pulmonary disease, and hypertension. AR 20. At step three, the ALJ found  
15 Plaintiff's impairments do not meet or medically equal the severity of a listed  
16 impairment. AR 23. At step four, the ALJ found Plaintiff has the residual functional

<sup>1</sup> The facts are only briefly summarized. Detailed facts are contained in the administrative hearing transcript, the ALJ's decision, and the parties' briefs.

<sup>2</sup> For ease and consistency with the parties' briefs, the Court cites to the consecutive pagination of the administrative record, which appears at ECF No. 9.

<sup>3</sup> The applicable five-step disability determination process is set forth in the ALJ's decision, AR 19–20, and the Court presumes the parties are well acquainted with that standard. Accordingly, the Court does not restate the five-step process here.

1 capacity to perform light work with certain limitations. AR 23. Further, at step four,  
2 the ALJ found Plaintiff is unable to perform any past relevant work. AR 26. Finally,  
3 at step five, the ALJ found jobs exist in significant numbers in the national economy  
4 that Plaintiff can perform considering his age, education, work experience, and  
5 residual functional capacity. AR 26. Accordingly, the ALJ determined Plaintiff was  
6 not disabled, as defined by the Social Security Act, since February 6, 2014. AR 27.

### **III. STANDARD OF REVIEW**

The Court must uphold an ALJ’s determination that a claimant is not disabled if the ALJ applied the proper legal standards and there is substantial evidence in the record as a whole to support the decision. *Molina v. Astrue*, 674 F.3d 1104, 1110 (9th Cir. 2012) (citing *Stone v. Heckler*, 761 F.2d 530, 531 (9th Cir. 1985)). “Substantial evidence ‘means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.’” *Id.* (quoting *Valentine v. Comm’r Soc. Sec. Admin.*, 574 F.3d 685, 690 (9th Cir. 2009)). This must be more than a mere scintilla but may be less than a preponderance. *Id.* at 1110–11. Even where the evidence supports more than one rational interpretation, the Court must uphold an ALJ’s decision if it is supported by inferences reasonably drawn from the record. *Id.*; *Allen v. Heckler*, 749 F.2d 577, 579 (9th Cir. 1984).

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## IV. ANALYSIS

**A. The ALJ reasonably assessed Plaintiff's claims about the severity of his symptoms.**

Plaintiff testified he has poor stamina, weakness, fatigue, and difficulty breathing, which limits his ability to walk, stand, lift, and carry. AR 49–54. Plaintiff testified that, during two periods of at least a month, he stopped taking his prescribed medications when he lost his insurance coverage. AR 53–54, 56. Plaintiff testified his symptoms worsened when he did not take his prescribed medications. AR 54. Plaintiff testified his breathing improved since he quit smoking but he still has trouble breathing with exertion. AR 50.

The ALJ found Plaintiff's "medically determinable impairments could reasonably be expected to cause the alleged symptoms" but his "statements concerning the intensity, persistence and limiting effects of these symptoms are not entirely consistent with the medical evidence and other evidence in the record." AR 24. In reviewing the record, the ALJ noted Plaintiff's condition improved with proper medication and smoking cessation. *See* AR 24.

Where a claimant presents objective medical evidence of an underlying impairment that could reasonably be expected to produce the symptoms alleged, and there is no evidence of malingering, an ALJ “must give specific, clear and convincing reasons in order to reject the claimant’s testimony about the severity of the symptoms.” *Diedrich v. Berryhill*, 874 F.3d 634, 641 (9th Cir. 2017) (quoting

1 *Molina*, 674 F.3d at 1112). A finding that the claimant’s testimony is not credible  
2 must be sufficiently specific to allow the Court to conclude the ALJ rejected it on  
3 permissible grounds and did not discredit it arbitrarily. *See Brown-Hunter v. Colvin*,  
4 806 F.3d 487, 493 (9th Cir. 2015) (quoting *Bunnell v. Sullivan*, 947 F.2d 341, 345–  
5 46 (9th Cir. 1991)). “General findings are insufficient; rather, the ALJ must identify  
6 what testimony is not credible and what evidence undermines the claimant’s  
7 complaints.” *Id.* (quoting *Reddick v. Chater*, 157 F.3d 715, 722 (9th Cir. 1998)).

8 Plaintiff argues the ALJ erred in assessing his claims about the severity of his  
9 symptoms. ECF No. 12 at 8–11. First, Plaintiff argues the ALJ “evidently”  
10 discredited his symptom claims based on his historical failure to take his  
11 medications while overlooking his testimony that he only did so when he lost his  
12 insurance.<sup>4</sup> *Id.* at 10. Second, Plaintiff argues the ALJ “implied” his prior smoking  
13 habit discredited his symptom claims.<sup>5</sup> *Id.* at 9–10.

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15 <sup>4</sup> The Ninth Circuit “proscribe[s] the rejection of a claimant’s complaints for lack  
16 of treatment when the record establishes that the claimant could not afford it.”  
*Regennitter v. Comm’r of Soc. Sec. Admin.*, 166 F.3d 1294, 1297 (9th Cir. 1999).  
17 But as explained above, the ALJ did not use Plaintiff’s historical failure to take his  
medications to discredit his symptom claims. Therefore, the reason why Plaintiff  
previously stopped taking his medications was irrelevant and the ALJ’s failure to  
incorporate it into her decision was not error or was harmless.

18 <sup>5</sup> It is uncertain whether the Ninth Circuit prohibits citing to a claimant’s continued  
19 smoking as adversely impacting his or her credibility. *See Bray v. Comm’r of Soc.*  
*Sec. Admin.*, 554 F.3d 1219, 1227 (9th Cir. 2009). Regardless, as explained above,  
the ALJ did not use Plaintiff’s prior smoking habit to discredit his symptom claims.  
Therefore, the ALJ’s mere mention of the fact that Plaintiff previously smoked was  
not error or was harmless.

1 Plaintiff misreads the ALJ’s decision. The ALJ made no finding on Plaintiff’s  
2 credibility. *See* AR 24; *see also* Soc. Sec. Ruling 16-3p (eliminating the term  
3 “credibility” to “clarify that subjective symptom evaluation is not an examination  
4 of an individual’s character”), *available at* 2017 WL 5180304, at \*1. Also, the ALJ  
5 did not completely disregard Plaintiff’s symptom claims but merely found they  
6 were “not entirely consistent” with the record. AR 24; *see also Carmickle v.*  
7 *Comm’r, Soc. Sec. Admin.*, 533 F.3d 1155, 1161 (9th Cir. 2008) (“Contradiction  
8 with the medical record is a sufficient basis for rejecting the claimant’s subjective  
9 testimony.”).

10 In reviewing the record, the ALJ noted Plaintiff’s condition improved with  
11 proper medication and smoking cessation. *See* AR 24; *see also Morgan v. Comm’r*  
12 *of Soc. Sec. Admin.*, 169 F.3d 595, 599 (9th Cir. 1999) (establishing it is reasonable  
13 to rely on medical evidence showing a claimant’s condition improved, even when  
14 it contradicts his or her subjective complaints); *Thomas v. Barnhart*, 278 F.3d 947,  
15 958–59 (9th Cir. 2002) (establishing it is permissible to consider medical evidence  
16 concerning the nature, severity, and effect of the symptoms of which a claimant  
17 complains). Ultimately, the ALJ found the record “supported . . . limitations in the  
18 residual functional capacity, but not in excess of those noted herein.”<sup>6</sup> AR 24.

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20 <sup>6</sup> Contrary to Plaintiff’s assertion, the ALJ did not “imply[]” she was discrediting  
his symptom claims solely because they were unsubstantiated by medical evidence.  
ECF No. 12 at 9 (citing AR 24); *see also Robbins v. Soc. Sec. Admin.*, 466 F.3d 880,

1       In context, it is clear the ALJ used neither Plaintiff's historical failure to take  
2 his medications nor his prior smoking habit to discredit his symptom claims.  
3 Instead, the ALJ considered those past facts—which are fairly part of the record she  
4 was required to analyze—because once those past facts were removed, Plaintiff's  
5 condition improved. *See AR 24.* Plaintiff's argument would produce absurd results  
6 by prohibiting the mere mention of these topics, thereby depriving the parties and  
7 decisionmakers of the reasonable inferences to be drawn from them.

8           After reviewing the record, it is apparent to the Court that substantial  
9 evidence supports the ALJ's findings because the record contains enough relevant  
10 evidence to persuade a reasonable person to view Plaintiff's symptoms claims the  
11 way the ALJ did. In making her observations, the ALJ identified what parts of  
12 Plaintiff's symptom claims are not credible and what evidence undermines them.  
13 *See AR 24.* The ALJ's findings are sufficiently specific for the Court to conclude  
14 the ALJ rejected Plaintiff's symptom claims on permissible grounds and did not

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16           883 (9th Cir. 2006) (prohibiting disregarding a claimant's testimony “solely  
17 because it is not substantiated affirmatively by objective medical evidence”). The  
18 ALJ's reference to “alleged medical records,” while confusing, did not suggest she  
19 thought Plaintiff's symptom claims lacked any affirmative, objective support. *See AR 24* (“In terms of the claimant's alleged medical records supplied a history of  
20 multiple conditions requiring some surgical intervention prior to the application  
date.”). The ALJ found the record supported some limitations but Plaintiff's  
symptom claims were “not entirely consistent” with the record. AR 24. This finding  
was permissible. *See Carmickle*, 533 F.3d at 1161 (“Contradiction with the medical  
record is a sufficient basis for rejecting the claimant's subjective testimony.”).

1 discredit them arbitrarily. The ALJ properly executed her function of reviewing the  
2 record, weighing the evidence, and resolving discrepancies and ambiguities. In sum,  
3 the ALJ gave specific, clear and convincing reasons for rejecting Plaintiff's claims  
4 about the severity of his symptoms. Therefore, the ALJ applied the proper legal  
5 standard and substantial evidence supports her decision.

6 **B. The ALJ reasonably weighed the opinion of Plaintiff's examining  
psychologist.**

7 In 2014, psychologist Frank M. Rosekrans, PhD, evaluated Plaintiff for  
8 psychological and psychiatric symptoms. AR 837–44. Dr. Rosekrans diagnosed  
9 Plaintiff with anxiety disorder and somatic symptom disorder. AR 838. Dr.  
10 Rosekrans opined Plaintiff had severe limitations in his ability to “[p]erform  
11 activities within a schedule, maintain regular attendance, and be punctual within  
12 customary tolerances without special supervision”; “[c]ommunicate and perform  
13 effectively in a work setting”; and “[c]omplete a normal work day and work week  
14 without interruptions from psychologically based symptoms.” AR 839.  
15 Additionally, Dr. Rosekrans opined Plaintiff had marked limitations in his ability  
16 to “[u]nderstand, remember, and persist in tasks by following detailed instructions.”  
17 AR 839. Dr. Rosekrans opined these limitations would persist throughout Plaintiff's  
18 lifetime. AR 839.

19 The ALJ gave Dr. Rosekrans's opinion little weight because “it is not  
20 supported by the examination findings,” “the longitudinal record does not support

1 [it]," and "the examination is a onetime evaluation and there are no other treatment  
2 records or diagnoses to support a persistent condition." AR 21.

3 There are three types of physicians: "(1) those who treat the claimant (treating  
4 physicians); (2) those who examine but do not treat the claimant (examining  
5 physicians); and (3) those who neither examine nor treat the claimant  
6 (nonexamining physicians)." *Garrison v. Colvin*, 759 F.3d 995, 1012 (9th Cir.  
7 2014) (quoting *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1995)). "As a general  
8 rule, more weight should be given to the opinion of a treating source than to the  
9 opinion of doctors who do not treat the claimant." *Id.* (quoting *Lester*, 81 F.3d at  
10 830). "While the opinion of a treating physician is thus entitled to greater weight  
11 than that of an examining physician, the opinion of an examining physician is  
12 entitled to greater weight than that of a non-examining physician." *Id.*

13 "To reject [the] uncontradicted opinion of a treating or examining doctor, an  
14 ALJ must state clear and convincing reasons that are supported by substantial  
15 evidence." *Revels v. Berryhill*, 874 F.3d 648, 654 (9th Cir. 2017) (alteration in  
16 original) (quoting *Ryan v. Comm'r of Soc. Sec.*, 528 F.3d 1194, 1198 (9th Cir.  
17 2008)). "If a treating or examining doctor's opinion is contradicted by another  
18 doctor's opinion, an ALJ may only reject it by providing specific and legitimate  
19 reasons that are supported by substantial evidence." *Id.* (quoting *Ryan*, 528 F.3d at  
20 1198).

1 An ALJ may reject a doctor's opinion if it is brief, conclusory, and  
2 inadequately supported by clinical findings. *Chaudhry v. Astrue*, 688 F.3d 661, 671  
3 (9th Cir. 2012). An ALJ may reject a doctor's opinion if it contradicts his or her  
4 own clinical notes or other recorded observations. *Bayliss v. Barnhart*, 427 F.3d  
5 1211, 1216 (9th Cir. 2005). Indeed, an ALJ may reject a doctor's opinion if it is  
6 internally inconsistent and inconsistent with other evidence in the record. *Morgan*,  
7 169 F.3d at 602–03. Additionally, an ALJ may reject a doctor's opinion if he or she  
8 has not seen the patient long enough to obtain a longitudinal picture of the relevant  
9 impairments, opines on a matter not related to his or her area of specialization, and  
10 presents no support for his or her opinion on the matter. *Holohan v. Massanari*, 246  
11 F.3d 1195, 1202 n.2 (9th Cir. 2001).

12 Plaintiff argues the ALJ erred in weighing Dr. Rosekrans's uncontradicted  
13 opinion. ECF No. 12 at 11–13. As a preliminary matter, the Court notes Plaintiff is  
14 incorrect to characterize Dr. Rosekrans's opinion as uncontradicted. As the ALJ  
15 noted, nonexamining medical consultants Jan L. Lewis, PhD and Carla van Dam,  
16 PhD reviewed the record and opined Plaintiff had no greater than mild restrictions  
17 and insufficient evidence existed to establish the presence of his mental health  
18 claims. See AR 21–22, 95–96, 104–05. Thus, in reviewing the ALJ's decision to  
19 give Dr. Rosekrans's opinion little weight, the Court requires specific and legitimate  
20 reasons, rather than clear and convincing reasons, supported by substantial

1 evidence.<sup>7</sup>

2 First, Plaintiff argues the ALJ disregarded Dr. Rosekrans's statement that  
3 Plaintiff "had a slight tendency to deny problems and present himself as free of  
4 problems." AR 838; *see also* ECF No. 12 at 12. But the ALJ is not required to recite  
5 every aspect of a medical opinion. And, Plaintiff takes this statement out of context:

6 [Plaintiff's Personality Assessment Inventory] was valid, although [his  
7 score on the inconsistency scale] was high; he was a little inconsistent  
8 in his answers. He had a slight tendency to deny problems and present  
9 himself as free of problems. His highest scale was Health Concerns,  
which is entirely reasonable since he is apparently disabled by health,  
heart, problems. He is coping with it well, and staying up beat and not  
depressed despite his condition.

10 AR 838.

11 In context, this statement does not undermine the ALJ's finding that Dr.  
12 Rosekrans's opinion "is not supported by the examination findings." AR 21. As the  
13 ALJ correctly noted, Dr. Rosekrans's own examination findings specified Plaintiff  
14 was normal in all mental health categories. *See* AR 21–22, 840–41. Namely,  
15 Plaintiff presented as normal in appearance, speech, attitude and behavior, mood,  
16 affect, thought process and content, orientation, perception, memory, fund of  
17 knowledge, concentration, and abstract thought. *See* AR 21–22, 840–41. When  
18 asked to "[l]ist all mental health symptoms that affect [Plaintiff]'s ability to work,"

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20 <sup>7</sup> While Dr. Lewis and Dr. van Dam's opinions cannot by themselves constitute  
substantial evidence to justify rejecting Dr. Rosekrans's opinion, *see Revels*, 874  
F.3d at 664, as discussed above, the ALJ provided other valid reasons for doing so.

1 Dr. Rosekrans wrote only “[h]ealth problems” and “heart problems”—an area  
2 outside his expertise as a psychologist. AR 838; *see also* AR 21; *cf.* 20 C.F.R.  
3 § 416.927(c)(5) (authorizing considering the scope of specialization when  
4 evaluating a medical opinion). Thus, the ALJ observed “it is unclear as to what [Dr.  
5 Rosekrans] relied in identifying restrictions, as the report gives no indication as to  
6 what specifically supported restrictions.” AR 22; *cf.* 20 C.F.R. § 416.927(c)(3)  
7 (authorizing considering supportability by medical evidence and the quality of  
8 explanation provided when evaluating a medical opinion). The ALJ did not err in  
9 this aspect of weighing Dr. Rosekrans’s opinion.

10 Second, Plaintiff argues the ALJ failed to explain how Plaintiff’s lack of  
11 mental health complaints or treatment in other portions of the record affects the  
12 legitimacy of Dr. Rosekrans’s opinion. ECF No. 12 at 12–13. But the ALJ was not  
13 required to draw this connection. It was enough for the ALJ to note, as a secondary  
14 reason for giving Dr. Rosekrans’s opinion little weight, that other portions of the  
15 record did not substantiate Plaintiff’s alleged mental health limitations. *See* AR 21–  
16 22; *cf.* 20 C.F.R. § 416.927(c)(4) (authorizing considering consistency with the  
17 record as a whole when evaluating a medical opinion). As the ALJ explained,  
18 Plaintiff “received no mental health diagnosis during other exams or treatments  
19 throughout the medical records, he denied anxiety or other symptoms during  
20 subsequent evaluations, and he did not seek mental health treatment throughout the

1 time period at issue.” AR 21. Moreover, Plaintiff’s “own testimony suggested a  
2 broad array of activities despite his suggested anxiety.” AR 22. Notably, Plaintiff  
3 “had no communication issues at the hearing.” AR 22. The ALJ did not err in this  
4 aspect of weighing Dr. Rosekrans’s opinion.

5 Finally, Plaintiff argues the ALJ could not rely on the fact that Dr.  
6 Rosekrans’s opinion was a onetime evaluation because it is only relevant to  
7 determining he was an examining psychologist and does not provide a basis for  
8 rejecting his opinion. ECF No. 12 at 13. Plaintiff is incorrect. In weighing Dr.  
9 Rosekrans’s opinion, it was proper for the ALJ to consider the length, frequency,  
10 nature, and extent of his examining relationship with Plaintiff. *See* AR 21; *cf.* 20  
11 C.F.R. § 416.927(c)(2)(i)–(ii) (authorizing considering these factors when  
12 evaluating a medical opinion). Again, the ALJ did not err.

13 Considering all, the ALJ provided specific and legitimate reasons for giving  
14 Dr. Rosekrans’s opinion less deference. Additionally, substantial evidence supports  
15 the ALJ’s reasons for doing so. The record contains enough relevant evidence to  
16 persuade a reasonable person to view Dr. Rosekrans’s opinion the way the ALJ did.  
17 The ALJ’s decision on this issue was rational and Plaintiff’s mere disagreement  
18 with it does not mean the Court should disturb it. “Where evidence is susceptible to  
19 more than one rational interpretation, it is the ALJ’s conclusion that must be  
20 upheld.” *Luther v. Berryhill*, 891 F.3d 872, 875 (9th Cir. 2018) (quoting *Burch v.*

1 *Barnhart*, 400 F.3d 676, 679 (9th Cir. 2005)). Therefore, the ALJ applied the proper  
2 legal standard and substantial evidence supports her decision.

3 In sum, the Court finds the record contains substantial evidence from which  
4 the ALJ properly concluded, when applying the correct legal standards, that  
5 Plaintiff does not qualify for social security benefits.

6 Accordingly, **IT IS HEREBY ORDERED:**

- 7 1. Plaintiff's Motion for Summary Judgment, **ECF No. 12**, is **DENIED**.
- 8 2. The Commissioner's Motion for Summary Judgment, **ECF No. 13**, is  
**GRANTED**.
- 9 3. The ALJ's decision is **AFFIRMED**.
- 10 4. The Clerk's Office is directed to **ENTER JUDGMENT** in the  
11 Commissioner's favor.
- 12 5. All pending motions are **DENIED AS MOOT**.
- 13 6. All hearings and other deadlines are **STRICKEN**.
- 14 7. The Clerk's Office is directed to **CLOSE** this file.

15 **IT IS SO ORDERED.** The Clerk's Office is directed to enter this Order and  
16 provide copies to all counsel.

17 **DATED** this 25th day of January 2019.

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20 SALVADOR MENDOZA, JR.  
United States District Judge